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Supreme Court, U.S.
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In The

Supreme Court of the United States

Timothy B Condit,
(Petitioner)
v.

Chase Bank, Formerly Bank One
(Respondent)

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit.

PETITION FOR WRIT OF CERTIORARI

Timothy B Condit
Self represented
4051 SW 128th Ave
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734-718-5026

QUESTIONS PRESENTED FOR REVIEW

The questions to this court are as follows:

Do the doctrines of Rooker-Feldman, res judicata and/or collateral estoppel preclude a civil rights action in a U.S. District Court, even in the instance that the judge in the original state court action did not have the jurisdiction to conduct the original trial and/or the authority to issue the orders he mandated?

If a company or its representative successfully petitions a court to take actions that are not permitted under the applicable statutes, and/or outside the jurisdiction of that court, and if that company subsequently benefits from executing the orders of the court, is that company acting as "an agent of the court" for purposes of determination of its liability under the civil rights statutes?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Condit respectfully requests this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Sixth District.

OPINIONS AND ORDERS ENTERED

The order of the Sixth District Court of Appeals denying my request for an en banc rehearing is copied verbatim in the Appendix starting on page 1a. It was entered on January 17, 2008.

The order of the Sixth District Court of Appeals affirming the District Court's decision is copied verbatim in the Appendix starting on page 2a. It was entered on September 17, 2007.

The order of the Unites States District Court for the Eastern District of Michigan denying my request for reconsideration is copied verbatim in the Appendix starting on page 7a. It was entered on September 18, 2006.

The order of the Unites States District Court for the Eastern District of Michigan dismissing my lawsuit is copied verbatim in the Appendix starting on page 9a. It was entered on August 24, 2006.

These above orders are referenced in the statement of the case on page 5.

This petition was originally filed and subsequently returned by the office of the court clerk with instructions to make corrections and re-submit no later than within 60 days of April 21, 2008.

JURISDICTION

The U.S. Supreme Court has jurisdiction under 28 U.S.C. § 1254(1) because a United States Court of Appeals has decided this matter in a way that appears to conflict with prior relevant decisions of the Supreme Court.

FEDERAL REGULATIONS INVOLVED

This case applies to the Bill of Rights of the U.S. Constitution protection against illegal search and seizure and the guarantee of due process and equal protection under the law.

The case also involves the doctrines of Rooker-Feldman, res judicata and collateral estoppel and when, if ever, application or misapplication of those doctrines may be in conflict with the Unites States Constitution.

In addition, this appeal relies on 42 U.S.C. § 1983 (Civil Rights Acts of 1871), specifically those provisions that define who may or may not be found liable for civil rights violations.

INTRODUCTION

This petition involves a foreclosure on a golf course property in Michigan. The essence of the appeal is that the judge who took certain actions in that matter did not have the jurisdiction/authority to intervene in this statutory foreclosure. This point has been raised repeatedly in all previous filings and hearings in which we clearly demonstrated numerous Michigan appeals courts' precedents that show without exception that the judge did not have the power to do what he did. For reasons that I cannot fathom, each court has ignored these arguments and at no time did any court issue an opinion that stated the judge clearly had jurisdiction and why they so ruled.

STATEMENT OF THE CASE

1. On February 7, 2003, a sheriff's sale was held to sell the real estate of The Medalist Golf Club in a statutory foreclosure by advertisement of a mortgage loan in default as directed by BankOne, the mortgagee. (BankOne had earlier acquired First Chicago/NBD, the company with whom the original loan was written. BankOne has subsequently merged into a new entity called JPMorgan Chase Bank and is known in Michigan and hereinafter as simply Chase Bank.) I was the principal owner of the business.

2. Shortly thereafter, the bank filed a lawsuit to collect the deficiency created by the sale. Michigan law allows such a lawsuit if the proceeds of the sale are less than the amount of the debt. The same

statute provides for only one defense by the defendant and that is to show that the sale price was less than the true value of the property.

3. The bank then filed a motion with the court to appoint a receiver and remove me from my business. My attorney argued against that motion and subsequently on numerous other filings that the Circuit Court did not have the authority to take such action citing Michigan statutes and numerous appeals court precedents. The judge ignored these arguments and based his decision (erroneously) on the contract between the parties.

4. The bank then advertised an auction of the personal property of the golf course. We appealed to the judge that the foreclosure sale and deficiency lawsuit as allowed by statute accounted for the entire indebtedness and therefore this sale constituted an illegal seizure of my property. The judge, once again erroneously relying on the contract between the parties, ruled against us. The bank "sold" the property to itself in an auction.

5. In May of 2004, the Circuit Court trial for the deficiency was held, an order was issued and the action in the lower court was completed. We filed an appeal with the Michigan Court of Appeals.

6. In our brief we argued that the Circuit Court did not have the jurisdiction to intervene in the statutory foreclosure and that the seizure of the personal property was contrary to Michigan law. The court affirmed the lower court without a hearing stating "...the questions to be reviewed are so unsubstantial as to need no argument or formal submission." They did not address the issue of the

judge's statutory authority which was and continues to be the foundation of our arguments.

7. We filed for leave to appeal in the Michigan Supreme Court. The request was denied stating that "...we are not persuaded that the questions presented should be reviewed by this court."

8. I then filed a civil rights complaint against the bank in the United States District Court in Detroit. The case was assigned to Judge Battani. She ruled that she was barred from hearing the case by the doctrines of Rooker-Feldman, res judicata and collateral estoppel. In spite of our consistent and ongoing argument that the state court did not have jurisdiction, Judge Battani applied the three doctrines to mean that regardless of whether the state court had the authority to act, she was nonetheless barred from proceeding, which is the essence of this appeal. Judge Battani also ruled that I had failed to allege that the bank acted as an "agent" of the state.

9. I then appealed to the Sixth Circuit Court of Appeals. The court denied my appeal applying the doctrines of res judicata and Rooker-Feldman. The court also agreed with Judge Battani that I had failed to allege the bank had acted as an agent of the state.

10. I requested an en banc rehearing on the basis that the court's ruling conflicted with U.S. Supreme Court precedents. In my brief I demonstrated that the Supreme Court had confirmed in its earlier precedent setting opinions that the original court must have jurisdiction and that the bank had clearly acted as an agent of the state and under the color of state law. The request was denied.

REASONS FOR GRANTING THE WRIT

One of the most fundamental elements of American jurisprudence is that the judge must have both the jurisdiction to hear a case and the authority to take any actions he orders granted to him by the legislature. It is inconceivable to me that Rooker-Feldman, res judicata and collateral estoppel could apply in a case where the original judge did not have the statutory authority to become involved. If that were true, it would be an incredible loophole to the assurance of constitutional rights. And, it simply does not appear to be consistent with the U.S. Supreme Court's rulings on those doctrines. In each of the rulings on those doctrines, as I showed in my en banc appeal, the Supreme Court's published opinions clearly included language that demonstrated the court verified that the original judge's action fell within his jurisdiction.

To state it another way, where does a citizen go for protection of his civil rights when a state court judge takes an action that he is not permitted to take under that state's laws? Isn't it illogical that a U.S District Court would be barred from getting involved in a suit that claims the original action was a violation of one's right of due process under the U.S. Constitution? Shouldn't the question of the jurisdiction of the original court be a primary element in the tests of application of these three doctrines?

The question of the state circuit court's jurisdiction in this case is not a matter of interpretation or

judicial decision in a gray area. The law and the numerous precedents in Michigan courts over 150 years make it clear that the judge did not have the authority to take the actions he did. But any reader of this document would find it hard to accept that statement given that every court I have addressed so far has rejected my arguments. So further explanation is necessary.

First, in my opinion, the original judge truly believed that he had jurisdiction. There are two statutes in Michigan for foreclosure, one which clearly opens the door for broad judicial discretion on an equitable basis, and a second statute that specifies a "simplified" foreclosure process but that requires the parties to meet specific obligations and precludes judicial intervention unless it can be demonstrated that fraud, accident or mistake has occurred (which neither party ever claimed in this instance.) For a judge to confuse the two statutes especially when a large national bank argues he has that authority is understandable.

But I believe the Michigan Court of Appeals and the Michigan Supreme Court have a bias against plaintiffs in all civil actions. I am not the only person who believes this. It has been stated by numerous citizens, attorneys and columnists in the state. Even if such a bias was true, I had believed that my case would be resolved in my favor by the Michigan Supreme Court because the court majority at the time of my leave to appeal were the same people who ruled in the case of Kubczak v. Chemical Bank 456 Mich. 653, 575 N.W.2d 745 (1998) and stated in their

opinion that the mortgagor is entitled to "...the possession and benefits of possession of the premises" during the redemption period. They cited several cases of precedent going back decades. The difference in that case and mine is that their ruling in Kubczak was in support of the defendant bank's claim that they had not taken possession of the property from the mortgagor during the redemption period. Clearly in my case, the court awarded "...the possession and benefits of possession of the premises" to the bank during the redemption period But in my case, the loss of possession of my business and property during the redemption period was, as they stated in their denial, "...so inconsequential as to fail to persuade..." them to review my appeal. Two cases, the same relevant issues and two different rulings, both in favor of the defendant. Citing selected text from the opinion does not seem appropriate in this instance so I have included a verbatim transcript Kubczak v. Chemical Bank in the Appendix (page 14a.)

If the Michigan appeals courts did not have the alleged bias then I am confident my appeal to them would have had the appropriate review and decisions. Certainly they would have determined whether the circuit court had the authority to act and would have issued their opinion accordingly. But they ignored this issue entirely. Their mandate is to overrule erroneous decisions from lower courts. But where is the protection for the average citizen that assures equal protection under the law when state courts demonstrate a bias? The logical assumption would be the courts of the United States.

This petition does not intend to present the arguments as to why the state circuit court did not have the legislative authority to intervene. Those arguments were made in the original brief and will be made again to the District Court if and when this honorable court remands the matter to Judge Battani. That is not the relevant question in this appeal. The question is whether the federal court must determine if the state court had the authority to act under the applicable statutes before applying the doctrines of Rooker-Feldman, res judicata and collateral estoppel.

If the three doctrines apply even in the instance where the judge did not have jurisdiction, the question then becomes: Is a party's only alternative to go to the United States Supreme Court in any instance where the claim is that the party did not receive due process? The definition of due process is of course not dissatisfaction with the result but a clear demonstration that either the judge did not have jurisdiction and/or the statutory authority to act, in other words, a "fair trial." My claim is that I did not receive a fair trial because the original judge did not have the jurisdiction to intervene and take certain of the actions he ordered. Michigan appeals courts did not repudiate my claim. Nor did they explain why the judge did have jurisdiction. They simply refused to hear my appeal and to rule on the merits.

The U.S. Court of Appeals cited a case that indicates the District Court would lack jurisdiction to review and determine the validity of state court judgments

"... even in the face of allegations that 'the state court's action was unconstitutional.' Feldman, 460 U.S. at 486; see also Blanton v. United States, 94 F.3d 227,233-34 (6th Cir. 1996)" (Appendix page 5a.) There are other cases that reference the same conclusion. This interpretation of Rooker-Feldman goes to the heart of this appeal.

Certainly when the original court becomes involved in an action or issues an order, the judge is implicitly indicating that he believes he has the authority to do so. If he does not have the presumed jurisdiction, then the parties are being denied due process which by definition is unconstitutional. Based on the citation above, one could conclude that a federal district court is precluded by Rooker-Feldman, res judicata and/or collateral estoppel from examining that single question. But surely the lack of jurisdiction must be an exception to this interpretation in all three doctrines.

I believe the cited language of the U.S. Supreme Court means that if a court that has proper jurisdiction and authority to be adjudicating the matter rules in a manner that is alleged to be contrary to the U.S. Constitution, the Rooker-Feldman doctrine nonetheless bars another action on the same matter in any federal court other than the Supreme Court. In that instance, Rooker-Feldman allows for the presumption that the state court is sophisticated enough to know when its decision violates the constitution, and in those instances where that decision is challenged, the only recourse is an appeal to the highest court in the land.

I do not believe that the cited language permits such an interpretation if it can be clearly demonstrated that the court making the ruling lacked jurisdiction to make the ruling in the first place. In other words, Rooker-Feldman clearly allows a ruling of a court with proper jurisdiction to stand even if the ruling is in error. I contend that Rooker-Feldman does not (or should not) allow a ruling made by a court that lacked jurisdiction to block a federal district court action on the same matter (whether said ruling is constitutional or not.)

The distinction between the two scenarios is significant. In the first instance, it's a matter of a legitimate court providing the parties due process but making an error. In the second instance, due process is denied and any decisions made by such a court, erroneous or not, must be ignored.

Neither the U.S. District Court nor the U.S. Court of Appeals made any comment in their opinions as to whether they believed the state circuit court had jurisdiction. One cannot tell from those documents whether those courts believed that the state court had jurisdiction and therefore Rooker-Feldman, res judicata and collateral estoppel applied, or whether the question of jurisdiction is moot when deciding if those doctrines apply. The opinion of the U.S. Court of Appeals did include the statement that a "... fair trial was held on the merits of the case." One could only agree with that comment if the original judge had the statutory jurisdiction to conduct the trial in the first place.

Shouldn't the doctrines of Rooker-Feldman, res judicata and collateral estoppel be clearly expanded and/or clarified to include any instance where the U.S. District Court determines that the original state court did not have the authority to act as it did?

On the matter of the basis for the civil rights claim, both the U.S. District Court and the Sixth Circuit Court of Appeals stated that I failed to demonstrate that the bank was acting as an agent of the state. I respectfully disagree. In the numerous filings in the many venues this matter has been adjudicated, I made it clear that the state court acted as a direct result of the bank's requests; that the bank made inaccurate claims and statements in its motion for the receiver; that the bank profited from the court's actions; that the bank used the court's order to displace me from my business, take control of my personal property, income and authority; that the bank then sold my personal property after being given direct access to it by the court; that the bank should be liable for prosecution because it should know and adhere to the laws of foreclosure in the state where it operates. This goes beyond an "*allegation* that the bank was acting as an agent of the state." These are the basic facts in this case with which the bank has generally agreed. Clearly if the court's actions as requested by the bank are not legitimate, then the bank participated in the denial of my civil rights as a state actor.

The U.S. Supreme Court ruled in Dennis v. Sparks 449 U.S. 24(1980):

> "As the Court of Appeals correctly understands our cases to hold, to act 'under of color of' state law' does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents."

In the current action, the bank was not only a participant but an instigator. If the court did not have the authority to act and the individuals that solicited the court and acted out the orders of the court did so in the interests of the bank, then the bank is guilty of violating my civil rights and should be subject to a suit in equity.

CONCLUSION

Regardless of anyone's level of understanding of the volumes of statutes issued by all the governing bodies throughout the country, the issue of this appeal simply comes down to the following question: Didn't the framers of the Constitution and the Bill of Rights clearly intend to assure that no citizen would be deprived of his property without a fair trial by a judge who has the jurisdiction to hear the case and the statutory authority to order any actions he takes?

Timothy B Condit

Self represented

APPENDIX

No. 06-2374
FILED JAN 1 7 2008
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TIMOTHY B. CONDIT,
Plaintiff-Appellant
v.
CHASE BANK, FORMERLY KNOWN AS BANK ONE, Defendant-Appellee.

BEFORE: CLAY and GIBBONS, Circuit Judges; and HOOD, District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.
The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/signature/
Leonard Green, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 06-2374

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED SEP 17, 2007. LEONARD GREEN, Clerk

TIMOTHY B. CONDIT,
Plaintiff- Appellant,
v.
CHASE BANK, formerly known as Bank One,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: CLAY and GIBBONS, Circuit Judges; HOOD, Chief District Judge

Timothy B. Condit, proceeding pro se, appeals a district court order dismissing his civil action characterized as filed pursuant to 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 340)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees

that oral argument is not needed. Fed. R. App. P. 34(a).

On May 30, 2006, Condit filed a complaint against Chase Bank, formerly known as Bank One (Chase), alleging that the defendant had seized his property in violation of the Fourth Amendment. Condit alleged that he and a business partner purchased a golf course with funds borrowed from Chase. According to Condit, his partner subsequently "declared bankruptcy and walked out on a debt to [him] of about $500,000." Condit stated that when he was unable to pay the required monthly payments on the loan, Chase "refused to negotiate any solution and eventually foreclosed by advertisement on February 7, 2003." Condit alleged that his property was purchased at a sheriff's by Chase for approximately $350,000 less than the full amount of the indebtedness."

Thereafter, Chase "filed a lawsuit [against Condit] to collect the $350,000 deficiency." A receiver was subsequently appointed by the court and Condit "was removed from the premises and all the cash flow of [his] business was diverted to [Chase]," which resulted in his loss of "all opportunity to redeem [his] property." The case proceeded to trial in 2004 and a judgment was ultimately entered in favor of Chase and against Condit. Condit appealed the adverse judgment. The Michigan Court of Appeals affirmed the trial court's judgment and the Michigan Supreme Court denied Condit's application for leave to appeal in January 2006.

Through the instant action, Condit challenges the state court proceedings. He argues that: 1)"[i]n a Foreclosure by Advertisement, judges have no authority to intervene barring fraud, accident or mistake;" 2)"[e]ven if a circuit court judge could intervene in a Foreclosure by Advertisement, which he may not, the judge could not make a ruling based on the loan documents because they are extinguished by the foreclosure sale;" 3)"[e]ven if the judge may intervene, which he may not, and even if the contract documents continue to breathe, which they do not, and even if the contract documents have a clause permitting the appointment of a receiver in the event of a default, which in this case there was such a clause, the judge may still not appoint a receiver during the redemption period;" and 4)"[e]ven if there are unpaid back taxes or insurance premiums that put the property at risk, a receiver may not be appointed." Condit sought unspecified relief.

Chase filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, to which Condit responded. A magistrate judge filed a report recommending granting Chase's motion. Over Condit's objections, the district court dismissed Condit's complaint. Condit's motion for reconsideration was subsequently denied by the district court. Condit filed a timely appeal.

We review de novo the district court's dismissal of a suit pursuant to Rule 12(b)(6). See Lepard v. NBD Bank, a Div. of Bank One, 384 F.3d 232,235 (6th Cir. 2004); Columbia Natural Res., Inc. v. Tatum, 58 F.3d

1101, 1109 (6th Cir. 1995). When considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss, "[t]he district court must construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." Tatum, 58 F.3d at 1109.

We conclude the district court properly dismissed Condit's complaint because it failed to state a claim upon which relief may be granted. First, Chase is not subject to liability under § 1983. In order to assert a § 1983 civil rights claim, a plaintiff must allege and prove that a person acting under color of state law deprived him of a right secured by the Constitution or laws of the United States. 42 U.S.C. § 1983; Christy v. Randlett, 932 F.2d 502,504 (6th Cir. 1991). Chase is not a state actor. Although private actors acting in concert with state officials may be subject to § 1983 liability, Dennis v. Sparks, 449 U.S. 24, 27-28 (1980), Condit did not allege that Chase acted in concert with a state agent.

Second, Condit's complaint is barred by the Rooker-Feldman doctrine. See Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462,486 (1983); Rooker v. Fid. Trust Co., 263 U.S. 413, 415-16 (1923) The Rooker-Feldman doctrine provides that federal district courts generally lack jurisdiction to review and determine the validity of state court judgments, even in the face of allegations that "the state court's action was unconstitutional." Feldman, 460 U.S. at 486; see also Blanton v. United States, 94 F.3d

227,233-34 (6th Cir. 1996). Condit's complaint merely reflected his dissatisfaction with the state courts' judgments in favor of Chase and was essentially an attempt to obtain unauthorized federal court review of those judgments. Any litigation of Condit's claims would necessarily involve review and possible modification of the state courts' judgments.

Third, Condit's claims against Chase are barred by the doctrine of res judicata. Res judicata, or claim preclusion, bars a subsequent action between the same parties or their privies based upon the same claims or causes of action that were or could have been raised and litigated in a prior action. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394,398 (1981); Kane v. Magna Mixer Co., 71 F.3d 555,560 (6thCir. 1995). The record indicates that the prior state civil action and the instant federal civil action involve the same parties, Condit and Chase; both actions are based upon and arise out of the same facts, namely the foreclosure of Condit's golf course property; the prior state lawsuit was adjudicated on the merits; and the instant action involves issues that were or could have been raised and litigated in the prior suit.

Accordingly, we affirm the district court's order. Rule 34G)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/signature/
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY CONDIT,

Plaintiff, Case Number: 06-12406

v. HON. MARIANNE O. BATTANI

CHASE BANK, f/k/a/ Bank One,

Defendant,

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Before the Court is Plaintiff's Motion to Reconsider the Court's Order dismissing his Complaint. Pursuant to E.D. MICH. LR 7.1 (g)(3), a motion for reconsideration that merely presents the same issues already ruled upon by the Court, either expressly or by reasonable implication, will not be granted. Czajkowski v. Tindall & Associates, P.C., 967 F.Supp. 951, 952 (E.D.Mich. 1997).

To that end, a party moving for reconsideration bears a heavy burden. Wrench LLC v. Taco Bell Corp., 36 F.Supp.2d 787, 789 (W.D.Mich.1998). In order to prevail, the movant must demonstrate: (1) the Court and the parties have been mislead by a palpable defect, and (2) the correction of that defect will result in a different disposition of the case. See LR 7.1 (g)(3). A "palpable defect" is an error which is

obvious, clear, unmistakable, manifest or plain. Fleck v. Titan Tire Corp., 177 F.Supp.2d 605, 624 (E.D.Mich. 2001); Marketing Displays. Inc. v. Traffix Devices. Inc., 971 F. Supp. 262, 278 (E.D.Mich. 1997) (citation omitted).

The Court finds that Plaintiff has failed to carry its burden of proving a palpable defect that warrants reconsideration. In his brief in support of his request for reconsideration, Plaintiff advances the very arguments raised in response to Defendant's Motion to Dismiss and in his objections to the Magistrate Judge's Report and Recommendation. The Court is not unsympathetic to Plaintiff's situation; however, the applicable law that governs the outcome of Plaintiff's motion dictates that the Court find he has failed to meet the strict standards governing motions for reconsideration.

Accordingly, Plaintiff's motion is **DENIED**.

IT IS SO ORDERED.

s/Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

DATE: September 18, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY CONDIT,

Plaintiff Case Number: 06-12406

v. HON. MARIANNE O. BATTANI

CHASE BANK, f/k/a/ Bank One,

Defendant,

OPINION AND ORDER DISMISSING PLAINTIFF'S COMPLAINT

Plaintiff Timothy Condit filed his pro se complaint pursuant to 42 U.S.C. § 1983 against Defendant JPMorgan Chase Bank, N.A. alleging a violation of the Fourth Amendment. Plaintiff asserts that his rights were violated when Defendant illegally seized his property.

Defendant filed a Motion to Dismiss (Doc. No.2), which was referred to Magistrate Judge Virginia Morgan pursuant to 28 U.S.C. § 636(b)(1)(B). Magistrate Judge Morgan filed her Report and Recommendation on July 24, 2006, recommending that dismissal be granted. Plaintiff opposes the recommendation. For the reasons that follow the

Court **REJECTS** the objections and **DISMISSES** Plaintiffs Complaint.

I. BACKGROUND

Plaintiff and his partner borrowed money from First Chicago/NBD to buy a golf course. The loan was secured by the real estate, personal property, and a guaranty from Plaintiff. After the partnership defaulted on the loan the bank foreclosed on the property, and it was sold at a sheriff's sale. Plaintiff attempted to redeem the property, albeit unsuccessfully.

Bank One purchased the property at the sale and filed suit in state court to recover the deficiency amount remaining on the loan, Plaintiff unsuccessfully opposed the law suit and the state court's decision to appoint a receiver over the golf course during the redemption period. Plaintiff appealed the state court's decision, and after he lost, he sought leave to appeal to the state supreme court. Plaintiff filed suit in this Court after the Michigan Supreme Court declined to hear his appeal.

II. STANDARD OF REVIEW

If objections are filed, " [a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations

made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

III. ANALYSIS

The gist of Plaintiff's brief in opposition to the Report and Recommendation is that he was denied his rights under state law, and his property was seized illegally. His brief merely reiterates the allegations contained in his Complaint. For example, Plaintiff is "convinced that the appointment of the receiver, seizure of [his] personal property and the award in an amount in excess of the deficiency were contrary to Michigan property law that has been in existence for over 150 years." Compl. at p. 4. Therefore he "turns to this Court for protection of his rights." Id.

At the outset of its discussion, the Court observes that Plaintiffs objections, which merely reargue the merits of the state court lawsuit, lack merit. The most glaring shortcoming in Plaintiff's Complaint that his constitutional rights have been violated is the absence of state action. To prevail in a § 1983 action, the plaintiff has the burden of showing that he was deprived of a constitutional right and that the deprivation occurred under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Searcy v. City of Dayton, 38 F.3d 282, 286 (6th Cir. 1994). A plaintiff may not proceed under § 1983 against a private party "no matter how discriminatory or wrongful" the party's conduct. Am. Mfrs. Mut. Ins. Co.. v Sullivan, 526 U.S. 40.50130 (1999) (internal

quotation marks and citations omitted). Defendant is not a state actor and is not subject to liability under the statute. Accordingly, Plaintiff has failed to state a claim for which relief can be granted, and dismissal pursuant to Fed.R.Civ.P. 12(b)(6) is appropriate.

In addition, the Magistrate Judge correctly observes that to the extent that Plaintiff is attacking the state court judgments, the Rooker-Feldman doctrine forbids this court or any federal court other than the Supreme Court to entertain an appeal from a decision by a state court See Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291-94 (2005); Sun Valley Foods Co. v. Detroit Marine Terminals. Inc. (In re Sun Valley Foods Co.), 801 F.2d 186, 189 (6th Cir. 1986) ("Review of final determinations in state judicial proceedings can be obtained only in the United States Supreme Court."). The Rooker-Feldman doctrine prevents this Court from exercising subject matter jurisdiction over Plaintiff's real property claims. As the losing party in state court, Plaintiff is not free to file suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment. Despite Plaintiff's efforts to designate his claim as one for a violation of his constitutional rights, distilled to its essence, the claims are based on his dissatisfaction with the judgments entered in the state courts. If Condit wishes to further challenge the Defendant's conduct, he should have filed for certiorari in the United States Supreme Court.

IV. CONCLUSION

Accordingly, the Court **DISMISSES** Plaintiffs Complaint.

IT IS SO ORDERED.

s/Marianne O. Battani .
MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

DATE: August 24, 2006

575 N.W.2d 745
(Cite as: 456 Mich. 653, 575 N.W.2d 745)

Supreme Court of Michigan.

Sally KUBCZAK, Plaintiff-Appellee,
v.
CHEMICAL BANK & TRUST COMPANY, Defendant-Appellant.

Docket No. 105755.
Calendar No.6.

Argued Dec. 9, 1997. Decided March 24, 1998.

"Real estate agent, who was showing foreclosed property during statutory right of redemption period, brought premises liability action against bank, which acquired property at foreclosure sale for injuries sustained in fall. The Bay Circuit Court, Lawrence M. Bielawski, J., denied bank's motion for directed verdict and entered jury verdict in favor of real estate agent. Bank appealed, and the Court of Appeals affirmed. Bank was granted leave to appeal. The Supreme Court, Brickley, J., held that bank did not exercise requisite dominion and control over property and, thus, was not a "possessor" for purposes of premises liability claim.
Reversed and remanded.

Marilyn J. Kelly, J., filed a dissenting opinion, in which Michael F. Cavanagh, J., joined.

**745 *655 Trogan & Trogan, P.C. by Bruce F. Trogan, Saginaw, for plaintiff-appellee.

James S. Jamo, Lansing, for defendant-appellant.

Warner, Norcross & Judd, L.L.P. by Jeffrey O. Birkhold, Grand Rapids, amicus curiae for Michigan Bankers Association.

OPINION

BRICKLEY, Justice.

In this premises liability action, we consider whether defendant-appellant Chemical Bank, as the mortgagee and nominal owner during the mortgage foreclosure redemption period, should be considered a "possessor" for purposes of premises liability. In the present case, plaintiff-appellee realtor was **746 injured while showing the foreclosed property during the statutory right of redemption period. Her ensuing premises liability action resulted in judgment against defendant-appellant Chemical Bank, and the Court of Appeals affirmed. We find that the bank was not a "possessor" of the property and, therefore, reverse the decision of the Court of Appeals and remand this case to the circuit court for entry of a judgment of no cause of action in favor of defendant-appellant Chemical Bank. [FN1]

FN1. The bank also appeals the decision below, finding that plaintiff was a business invitee of the bank. Our determination that the bank was not a "possessor" for purposes of premises liability makes resolution of that issue unnecessary.

In 1979, Aldon and Nancy Hines purchased a house in Bay City. They financed most of the purchase price with a mortgage that they obtained from defendant- *656 appellant Chemical Bank & Trust Company. The ten-year mortgage provided for a "balloon" payment of the entire balance in June 1989. The Hineses lived in the house from1979 until late October 1989.

Over the years, the Hineses occasionally fell behind on their payments, but were able to catch up. Employment problems caused more serious difficulty in 1988 and 1989. The parties arrived at an interim solution, but soon the Hineses were again in arrears. Their final payment was made in August 1989. By that point, the final balloon payment was overdue.

On August 1, 1989, the bank notified the Hineses in writing of its intention to begin a foreclosure by advertisement. M.C.L. § 600.3201 et seq.; M.S.A. § 27A.3201 et seq. The bank's letter gave a figure in excess of $50,000 for the total amount due, including principal, interest, and late fees.

In September 1989, the Hineses listed their house for sale with Dial Real Estate. In October, the bank initiated the foreclosure process. Near the end of that month, the Hineses moved out of the house and into an apartment. The parties disagree with regard to the reason for the move. The Hineses say the bank ordered them to move and that Ms. Hines mailed their only key to W. Roger Mikusek, the bank loan officer who was handling this file. Mr. Mikusek and the bank deny those allegations.

A sheriff's sale was held in November 1989. The bank bid the amount owed by the Hineses, and received a sheriff's deed. Under the foreclosure statute, however, a homeowner has six months to redeem a foreclosed house, and a sheriff's deed *657 does not actually take effect until the redemption period expires. [FN2]

FN2. The applicable redemption statute, M.C.L. § 600.3240(4); M.S.A. § 27A.3240(4), provides in part:[I]f the amount claimed to be due on the mortgage at the date of the notice of foreclosure is more than 66-2/3% of the original indebtedness secured by the mortgage, the redemption period shall be 6 months.

This provision is now found in M.C.L. § 600.3240(8); M.S.A. § 27A.3240(8), as amended by 1996 P.A. 214.

M.C.L. § 600.3236; M.S.A. § 27A.3236 governs the effect of a mortgagor's failure to redeem:

Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named ... all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage....

After moving out in October, Nancy Hines instructed the utility companies to have all the service billings put in the name of the bank. The bank's only involvement with the property during the redemption period was to observe the house from the street, confirm with the realtor that the heat was operating in the home, pay the utilities, and list the property on the bank's insurance policy because the

homeowner had allowed the insurance coverage to lapse for nonpayment of premiums. At no time did any representative of the bank enter the house. [FN3]

FN3. Although the parties stipulate that the redemption period was six months, the period is shortened to one month if the mortgagors abandon the property. M.C.L. § 600.3240(6); M.S.A. § 27A.3240(6)(this provision is now M.C.L. § 600.3240[10]; M.S.A. § 27A.3240[10], as amended by 1996 P.A. 214). Although the bank evidently considered whether it could invoke that provision, its apparent conclusion was that the Hineses' action of listing the property for sale precluded the bank from arguing that they had abandoned the house.

**747 *658 At some point, the Hineses renewed the listing for an additional three months and reduced the asking price. The bank emphasizes that this demonstrates the Hineses' continued exercise of dominion over the property.

Plaintiff Sally J. Kubczak is a real estate agent for Bay City Realty Company. On March 14, 1990, six weeks before the end of the redemption period, she made arrangements with the listing agency, Dial Real Estate, to show the house to one of her clients. [FN4] As she and her clients were leaving through the garage, she slipped and fell, sustaining a broken hip that required surgery. Plaintiff alleges that her fall was caused by a combination of oil, water, and leaves that made the garage floor dangerously slippery.

FN4. Dial controlled access to the property by placing a key, obtained from the Hineses, in a realtor's lock box on the door of the house. It was through the use of this key that plaintiff gained access to the house on the day she was injured.

The last day for the Hineses to redeem the property from foreclosure was May 3, 1990. A few weeks before that date, another real estate agent found potential buyers but, because of the foreclosure situation and IRS tax liens, it became apparent that the deal could not be finalized before May 3. The bank agreed to sell the house for the real estate agency after the sheriff's deed took effect, and, on May 9, 1990, the house was sold for $65,000. The bank received approximately $58,000, which covered the mortgage balance, interest, late fees, and foreclosure costs, while the IRS realized about $4,000 from its liens. After the usual closing costs were paid, the real estate agency received as commission the remainder of the proceeds, an amount slightly under $3,000. The *659 Hineses received nothing from the sale, owing both to the fact that their equity of redemption had expired and that no balance was left after everyone else had been paid.

In October 1990, plaintiff brought the present suit against Chemical Bank, Dial Real Estate Agency, and the Hineses. Dial settled the claim for $10,000, and the cause continued to trial against the bank. [FN5] The basis for plaintiff's complaint was that, at the time of her March 1990 accident, the bank was the "possessor" of the property and she was a

business invitee of the bank. The trial court denied the bank's motion for a directed verdict, ruling that the evidence would permit the jury to find that the bank had been a possessor of the property, even if the possession had been nonexclusive and the Hineses also had remained possessors. The bank preserved this issue by timely objection. The jury found for plaintiff and, answering specific questions, found that the bank was a possessor of the premises at the time plaintiff fell and was negligent, and that the bank's negligence was a proximate cause of her injury. After reductions for comparative negligence, the settlement with Dial, and payments from collateral insurance sources, plaintiff was awarded approximately $78,500, plus costs and judgment interest.

FN5. A default judgment was entered against the Hineses, who have since discharged the judgment in bankruptcy.

In an unpublished per curiam opinion, the Court of Appeals upheld the circuit court's ruling that a jury could find the bank to have been in possession of the premises, stating:

*660 The trial court did not err in refusing to direct a verdict in favor of defendant on the issue of possession and control. Premises liability is conditioned upon the presence of possession and control, not necessarily ownership. Merritt v. Nickelson, 407 Mich. 544, 287 N.W.2d 178 (1980). Moreover, a mortgagee may be placed in possession by the mortgagor. Morse v. Byam, 55 Mich. 594, 22

N.W. 54 (1885). The evidence presented was sufficient to support the verdict that defendant was a possessor of the premises.[[FN6]]

FN6. Issued February 9, 1996 (Docket No. 166480).

The bank applied for leave to appeal, which this Court granted. 454 Mich. 918 (1997).

II

[1][2] It is well established, as the Court of Appeals noted, that "[p]remises liability is conditioned upon the presence of both possession and control over the land." / Merritt v. Nickelson, supra at 552, 287 N.W.2d 178; Orel v. Uni-Rak Sales Co., 454 Mich. 564, 563 N.W.2d 241 (1997).

[3] In the present case, the bank had no legal right of possession during the six-**748 month redemption period. It is certainly true, as the Court of Appeals stated, that the Hineses, as mortgagors, had the authority to place the mortgagee-bank in possession of the premises. However, we have consistently given careful scrutiny to any transaction in which a mortgagor waives its statutory right of redemption. The rule we stated in Massachusetts Mut. Life Ins. Co. v. Sutton, 278 Mich. 457, 461, 270 N.W. 748 (1936), remains sound:

[I]t has been the definite and continuous policy of this State to save to mortgagors the possession and benefits of the mortgaged premises, as against the mortgagees, until expiration of the period of redemption.

*661 Thus, a mortgagee can obtain possession, but only for consideration, id at 463, 270 N.W. 748, and pursuant to an explicit agreement. Bennos v. Waderlow, 291 Mich. 595, 600, 289 N.W. 267 (1939); Russo v. Wolbers, 116 Mich.App. 327, 323 N.W.2d 385 (1982). [FN7]

FN7. Alternatively, a mortgagee can gain possession if the mortgagor abandons the property. See n. 3. The plaintiff has disclaimed this theory in both the circuit court and this Court.

[4] Nothing in the record indicates that any agreement was made between the bank and the Hineses that would provide the bank with the immediate right to possess the foreclosed property. The fact that the bank was the high bidder at foreclosure proceedings did not grant it any rights of ownership or possession, but, rather, gave the bank a contingency interest in the property with respect to title ownership. Accordingly, any interest the bank had would not vest until after expiration of the redemption period.

[5] The bank asserts that because it was not entitled to immediate occupation of the land under our mortgage law, it could not have been a "possessor" of the property in question for purposes of premises liability. Although we agree that the bank had no legal right of possession before May 3, 1990, possession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the actual exercise of dominion and control over the property. Merritt, supra. If we were to accept the bank's

formulation, one who wrongfully exercised dominion and control over property would escape liability solely on the basis that there was no legal or theoretical possession.

The purpose behind the principle requiring actual possession and control was best expressed in *662 Nezworski v. Mazanec, 301 Mich. 43, 56, 2 N.W.2d 912 (1942):

"It is a general proposition that liability for an injury due to defective premises ordinarily depends upon power to prevent the injury and therefore rests primarily upon him who has control and possession,"

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"Liability for negligence does not depend upon title; a person is liable for an injury resulting from his negligence in respect of a place or instrumentality which is in his control or possession, even though he is not the owner thereof." [Citations omitted; emphasis added.]

In the present case, plaintiff alleges that she was injured because the parties who were in possession and control allowed a dangerous condition to develop on the garage floor, As we observed in Nezworski, supra, it is appropriate to impose liability on the person who created the dangerous condition or who had knowledge of and was in a position to eliminate the dangerous condition. Plaintiff asserts that the bank's actions toward the mortgaged property meet the requisite level of control for purposes of premises liability. We disagree.

[6] The record before us indicates that the bank commenced foreclosure by advertisement proceedings on October 5, 1989. A foreclosure sale occurred on November 3, 1989, and the statutory period of redemption expired on May 3, 1990. The bank's only involvement with the property during the redemption period was to observe the house from the street, pay the utilities after the Hineses changed the billing, confirm with the realtor that the heat was operating in the home, and list the property on the bank's insurance policy *663 once the Hineses allowed their insurance to lapse. [FN8] On these actions, **749 which comprise the sum and substance of the bank's conduct toward the mortgaged premises, we do not find the requisite control. In reviewing a trial court's ruling on a motion for a directed verdict, this Court examines "the testimony and all legitimate inferences that may be drawn in the light most favorable to the [nonmoving party]." Mulholland v. DEC Int'l Corp., 432 Mich. 395, 415-416, 443 N.W.2d 340 (1989). Here, making all reasonable inferences in plaintiff's favor, we conclude that the trial court erred in denying the bank's motion for a directed verdict and, accordingly, the Court of Appeals erred in affirming the trial court's ruling.

FN8. The statutes applicable to mortgaged property permit a mortgagee to maintain payments of taxes and insurance premiums if the mortgagor fails to make those payments, particularly during a redemption period. M.C.L. § 600.2927; M.s.A. § 27A.2927, M.C.L. § 600.3240; M.S.A. § 27 A.3240.

It is clear to us that the bank's limited actions during the redemption period were taken in connection with the foreclosure proceedings and for the sole purpose of preserving the value of the premises during the redemption period. [FN9] Rather than accepting plaintiff's assertion that these actions evidenced an exercise of control over the property, we believe that the bank's actions are better characterized as those of a secured party concerned with preserving the value of its collateral asset.

FN9. Plaintiff asserts that the bank's officer, W. Roger Mikusek, made misrepresentations to the Hineses concerning their rights during the redemption period. We note that the alleged misrepresentations, even if true, were not actions toward the property and, although potentially actionable by the Hineses in their own right, are irrelevant to the instant issue of premises liability. Similarly, the dissenting opinion's discussion of possible fraud, oppression, or over-reaching does not bear on whether the bank exercised the requisite control to subject it to liability for plaintiffs injury under a premises liability theory.

III

On the record before us, we can locate no basis for finding the bank liable as a "possessor" for the painful accident that befell Ms. Kubczak. We find that the bank did not exercise the requisite dominion and control over the property and, therefore, cannot be considered a "possessor" for purposes of premises liability. Accordingly, we reverse the decision of the

Court of Appeals and remand this case to the circuit court for entry of a judgment of no cause of action in favor of defendant-appellant Chemical Bank.

MALLETT, C.J., and BOYLE, WEAVER and TAYLOR, JJ., concurred with BRICKLEY, J.

MARILYN J. KELLY, Justice (dissenting).

I respectfully dissent. The issue in this case is whether, for purposes of determining premises liability, a mortgagee can be considered a "possessor" during the mortgage foreclosure redemption period. If so, can the mortgagor's real estate agent be the mortgagee's business invitee?

When evaluating a motion for directed verdict, the trial court must consider the evidence in the light most favorable to the nonmoving party. All reasonable inferences are made in the nonmoving party's favor. Locke v. Pachtman, 446 Mich. 216, 223, 521 N.W.2d 786 (1994). Drawing all reasonable inferences in favor of the plaintiff, I find that there was sufficient evidence for the jury to hold the mortgagee liable. Therefore, I would affirm the decision of the Court of Appeals. The trial court did not err in denying defendant's motion for directed verdict.

The majority relies on the rarely cited case of Massachusetts Mut. Life Ins. Co. v. Sutton [FN1] for the proposition that it is the policy of this state "to save to mortgagors the possession and benefits of the mortgaged premises, as against the mortgagees,

until expiration of the period of redemption." The next sentence of that opinion reads: "This court has attempted to guard the policy and protect the mortgagor against the opportunity for fraud, overreaching, or oppression by the mortgagee...." Id

FNI. 278 Mi_h. 457, 461, 270 N.W. 748 (1936).

I believe that the mortgagee's agent, Roger Mikusek, could have been guilty of fraud, overreaching, or oppression. There is evidence that, after the foreclosure sale, Mr. Mikusek led the Hineses to believe that they were not entitled to retain possession of the house during the redemption period.

**750 Specifically, there was corroborated testimony that Mr. Mikusek told the Hineses to move out of the house. He demanded the key, and Mrs. Hines sent it to him. Although the bank denies these allegations, a jury could have found Mrs. Hines to have been the more credible witness.

Additionally, there is testimony that Mr. Mikusek asked the real estate agent to enter the house to ascertain whether it was adequately heated. The bank paid the utility bills for the house as they fell due after the Hineses moved out. The bank took these actions, no doubt, to protect its collateral; however, it was reasonable for the jury to use them as the basis for a finding that the bank took possession and control of the house.

*666 Mr. Mikusek testified that the bank's legal counsel instructed him that the bank had no legal right to possession of the property during the redemption period. But Mr. Mikusek's handwritten note stating, "Hines, ours today, 11/3/89," suggests that the bank did take possession after the foreclosure sale. Again, on the basis of this evidence, the jury reasonably could have found in the plaintiffs favor.

Facts in evidence showing misrepresentations by the bank are that the Hineses moved out of the house in October, 1989, and never returned. They spent $3,975 to rent an apartment for six months, an expenditure they say was made necessary only by the bank having taken possession of the house. Mrs. Hines testified that she would not have rented an apartment had she believed herself entitled to remain in the house. She testified that Mr. Mikusek told her to "[j]ust get out or I will get you out personally." Also, she testified that she was forced from her home and never would have left voluntarily. Rather, she left in reliance on Mr. Mikusek's misrepresentations. The majority finds that these misrepresentations are irrelevant to the issue of premises liability. However, the jury may have concluded that they led to the ouster of the Hineses which resulted in the bank taking possession of the premises.

Even though a mortgagee normally is not entitled to take possession of property until after expiration of the redemption period, there was evidence here that that is what happened. It was reasonable for the jury

to find that the mortgagee's actions rose to the level of fraud, oppression, or overreaching. A mortgagee should not be allowed to shield itself from tort *667 liability if it strong-arms a mortgagor into vacating his premises prematurely.

As this Court recently stated in Orel v. Uni-Rak Sales Co., Inc., [FN2] "Who had possession of a piece of land presents a factual issue for resolution by the jury." A question of fact existed in this case concerning whether the mortgagee took possession and control of the property. A reasonable jury could have concluded that the Hineses were forced out of their house, and the bank then became the possessor by exercising control over it. Therefore, I would affirm the decision of the Court of Appeals.

FN2. 454 Mich. 564, 569, 563 N.W.2d 241 (1997).

II

Next, the legal status of the plaintiff must be identified to permit a determination of the duty of care owed to her. The issue is whether the trial court erred in finding, as a matter of law, that if the mortgagee was a possessor of the house, plaintiff was mortgagee's business invitee.

The mortgagee argues that, because it did not invite plaintiff onto the property, the plaintiff is not its invitee. The invitation to enter the premises need not be express. According to the standard jury instructions, "An invitation may be either express or implied." SJI2d 19.01. It may be implied even

though the mortgagee did not initially invite the plaintiff real estate agent onto the property.

Additionally, the mortgagee argues that the plaintiff is not its invitee because the plaintiff was not on the property for any business purpose of the mortgagee. It points out the policy behind imposing a higher duty *668 of care on one who invites a business visitor onto his premises. The policy is that an invitor potentially has some pecuniary gain from the visit and is the person in the best position to make the property safe at the time of the business visit. **751 That policy is not advanced, it argues, by imposing the duty on a party who did not invite the person onto his premises for the party's business purpose or pecuniary interest.

Here, plaintiff's presence on the property had the potential of being economically beneficial to the mortgagee. Had she sold the house, the mortgagee would have benefited, because the proceeds of the sale would have satisfied the outstanding debt owed to it. Furthermore, the mortgagee was in the best position to make the premises safe, because it held the key to the house and was in control of the property.

The trial court did not err in determining that the plaintiff's status in this case is that of a business invitee. As a real estate agent, she was invited to go onto real property for a purpose directly or indirectly concerning business dealings with the possessor of the land. 2 Restatement Torts, 2d, § 332, p. 176. The bank was not required to directly initiate business

dealings with her in order to render her a business invitee. Plaintiff's efforts to sell the house were sufficiently connected with the bank's business interests to render her the bank's business invitee.

I am not suggesting that any realtor who shows a house at the request of its owner is a business invitee of the owner's mortgagee or other lienholders. The present case is factually unusual. Under its particular circumstances, I find that the plaintiff was a business invitee of the bank.

*669 I agree with the Court of Appeals that the evidence was sufficient to support the verdict that the bank was a possessor of the premises. I also agree that the trial court did not err in concluding as a matter of law that the plaintiff was a business invitee of the bank. Therefore, I would affirm the decision of the Court of Appeals.

MICHAEL F. CAVANAGH, J., concurred with MARILYN J. KELLY, J.

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